BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES - CHAIRMAN
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

In the matter of:

SIR MORTGAGE & FINANCE OF ARIZONA, INC., an Arizona corporation,

GREGORY M. SIR (a/k/a "GREG SIR"), and ERIN M. SIR, husband and wife,

Respondents.

Docket No. S-20703A-09-0461

RESPONDENTS' REPLY TO THE RESPONSES TO MOTION TO VACATE TEMPORARY ORDER AND SUPPLEMENT AND MOTION TO VACATE TEMPORARY ORDER

The Temporary Order to Cease and Desist ("TO") and the Notice of Opportunity for Hearing ("Notice") are not bound at the hip. The Respondents' Motion to Vacate and the Supplement (collectively, the "Motion") thereto relate only to the inappropriateness of the issuance of the TO. Regardless of whether the Respondents' Motion is granted or denied, there still is a hearing on the Notice scheduled to begin on February 1, 2010.

Although the TO and the Notice present two distinctly different issues, the Division's Responses primarily address the allegations in the Notice. There is good reason for this approach by the Division. The Division is without viable arguments to justify the issuance and continuance of the TO.

I. Temporary Orders are only to be issued when the public welfare requires immediate action.

A.A.C. R14-4-307 is very clear. The Commission is to determine that the public welfare requires immediate action ***before*** a TO may issue. Remarkably, unlike the requests for extraordinary relief in State and Federal Courts, the Division apparently does not even have to engage in an *ex parte* request to a sitting judge or ALJ before a TO issues. That is enormous power. Extraordinary relief carries with it the requirement that some basis, in fact, exists prior to issuance.

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A temporary order to cease and desist is an order immediately effective against respondents. Findings in an administrative order must be supported by at least "substantial evidence." *See Grand Canyon Trust v. Arizona Corp. Comm'n*, 210 Ariz. 30, 34 ¶11; 107 P.3d 356, 360 (App. 2005). Thus, for example, when the Utilities Division applies for an order appointing an interim operator of a utility, it will attach affidavits, and often photographs or documents. In contrast, the Division provided no evidence in support of its TO – no affidavits, no declarations, no transcripts – only allegations. Indeed, the TO itself states that it is "based on the above allegations" rather than evidence.[1] For this reason alone, the TO should be vacated.

Respondents' Motion is not meant to attack all TOs issued by the Division. Quite the contrary, Respondents understand that when the public welfare requires immediate action, such an extraordinary step may be appropriate. But this is not one of those situations. Sir Mortgage & Finance of Arizona, Inc. ("Sir Mortgage") has been in business for twelve years. It does not advertise in the print media or on the Internet. It has, over its twelve-year existence, developed relationships with lenders and referrals from lenders, who provide its funds. Since there is no public solicitation by Sir Mortgage, the "public welfare" is not in danger. In addition, Mr. Sir and his family members often fund loans along with other lenders. Respondents are hardly a threat to the public, or themselves, and the Division knows this to be true.

In *Mayflower Securities Co., Inc. v. Bureau of Securities*, the New Jersey Supreme Court vacated, set aside, and remanded to the New Jersey Bureau of Securities ("Bureau") an order from the Bureau that suspended registration of a broker-dealer in securities because of minor technical violations. *See Mayflower Securities Co., Inc. v. Bureau of Securities*, 312 A.2d 497 (N.J. 1973). A copy is attached hereto as Exhibit "A." Like the "public welfare" requirement in R14-4-307, New Jersey's laws required a "public interest" element be established before a suspension or revocation order was issued. *Id.* at 312 A.2d at 499-500. That Court noted a suspension of Mayflower would effectively put the company out of business for an extended period, would deprive its customers of services, and may result in the permanent loss of customers. *Id.* at 501.

[1] TO, at page 16, line 16.

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The Court stated the suspension tool – like the TO employed by the Securities Division here – was a sanction "obviously designed for use in serious situations." *Id.* at 500. The public interest element implied the suspension or revocation was necessary to protect present and future customers of the registrant. *Id.* The Court noted that not every minor or technical infraction is meant to result in a suspension of business activity. *Id.* In vacating the suspension order, the New Jersey Supreme Court held, "there was certainly no injury to the public interest in the instant circumstances." *Id.* at 502.

Here, the Division contends in highly conclusory fashion that after ***twelve years*** of openly operating as a licensed mortgage banker in Arizona, subject to the extensive regulation by the Arizona Department of Financial Institutions ("ADFI"), the Respondents' business activities are ***now*** an imminent threat to the State of Arizona's public welfare. The Division provides no evidence or viable explanation regarding how Arizona's public welfare required the immediate action it took. Rather, the Division ***alleges*** the public welfare was endangered by the funding of two loans in August of this year. One was for $40,000 and the other for $200,000. That is it? That threatened the public welfare? The test for the issuance of a TO is the "public welfare requires immediate action." The Division failed this test.

There is nothing preventing the Division from acting in a just and reasonable manner. It is simply not required that the Division exercise the extraordinary remedy of obtaining a TO every time it perceives a technical infraction of the securities laws. Importantly, the public welfare of the State of Arizona is not now, and never was, in need of protection from the Respondents. The Division's position is untenable and is a gross abuse of the powers afforded the Commission under the Securities Act and Administrative Rules. The TO should be immediately vacated.

The Division also erroneously maintains that the Respondents do not suggest they will alter the way they offer the loans if the TO is vacated. (*See* Response at page 3, lines 6-7.) This remark is simply another baseless conclusory statement made by the Division. While Respondents do not concede there was anything inappropriate about the manner in which business was conducted (*see* Respondents' July 15, 2009 letter attached as Exhibit A to the Answer and Motion to Vacate), the Division knows Respondents have been meeting with experienced transactional counsel to review

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the manner in which Sir Mortgage operated to ensure compliance with all Arizona laws. The Division knows this to be true because the Division counsel was told this by Respondents' counsel. The Division was also provided with the name of the lawyer with whom Respondents are consulting. Respondents tried diligently to address the Division's concerns and asked several times for meetings to resolve those concerns. Instead, the Division issued a TO.

II. The Administrative Law Judge has the power – and the duty – to vacate an unfounded or inappropriate TO.

The Division poses a direct challenge to the ALJ's authority to manage his docket. The Division argues that "Neither the" TO Rule,[2] "nor any other rule or statute applicable to the Act allows the ALJ to summarily vacate the TC&D."[3] Instead, the Division argues the ALJ is powerless to grant the motion, and the ALJ only has authority to hold the hearing in February and then issue a Recommended Opinion and Order to the Commission.[4] The Division's argument is breathtaking – no legal deficiency, no logical inconsistency, no factual scenario, no considerations of justice or fairness – nothing would be so great so as to permit the ALJ to vacate the TO. That is not, and must not be, the law. A free country does not allow executive officials to take such drastic actions as shutting down a business without having to account for their actions before a tribunal officer.

Here, the ALJ is the Commission's "Presiding Officer." A.A.C. R14-3-102.G. As such, the ALJ is delegated as the Commission's authority to manage all aspects of the case until the issuance of a final order. *See e.g.* A.A.C. R14-3-108.A. (Presiding Officer has authority over "such other matters as may expedite orderly conduct and disposition of the proceedings or settlements thereof.") Certainly, ALJs have the power to consider and rule on motions – as they do on countless occasions.

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[2] *See* A.A.C. R14-4-307 (hereinafter, the "TO Rule").

[3] Securities Division Supplemental Response to Respondents' Motion to Vacate Temporary Order, page 4, lines 20-21.

[4] *Id.*, page 4, lines 22-23.

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In essence, the Division seems to argue the assigned ALJ only has the powers specifically enumerated in the Commission's rules. But the Division's own filings in this case belie that idea, because the Division has filed numerous motions that are not specifically mentioned in the Commission's rules, and for which no rule specifically delegates power to the ALJ to rule upon. For example, in just the last month, the Division filed (1) a "Motion for Motion Practice Scheduling Order"; (2) an "Objection to Respondent's Request for Issuance of Administrative Subpoenas" (the Commission's rules only mention motions to quash subpoenas once they are issued); and (3) an "Objection and Motion to Quash Respondent's First Request for Production of Documents." Respondents do not question the ALJ's authority to rule on such motions. As no specific delegation appears in the Commission's rules for such motions, the Division too must recognize the ALJ has broad authority over pre-decision matters.

The Division's argument that the ALJ cannot exercise this delegated power is especially ironic given the Director was delegated the power to issue TOs by the Commission, and then sub-delegated that authority to the Assistant Director. Either the Commission's authority can be delegated, or it cannot. The Division cannot have it both ways. Nor can the Division argue delegation must occur by rule, because the TO Rule does not itself delegate authority to the Assistant Director. Instead, the TO Rule states the Commission "may" delegate to the Director. A.A.C. R14-4-307.A. The TO Rule says nothing about sub-delegating this power to the Assistant Director.

Moreover, the TO Rule specifically contemplates vacating the TO prior to a final decision. The TO Rule discusses vacating a TO in two places: (1) in subsection D, the rule states that the Commission may vacate the TO "after such hearing, by written findings of fact and conclusions of law;" and (2) in subsection A, which states that the TO "will be in effect... until vacated." The reference to vacating the TO in subsection A must refer to vacating the TO prior to the final decision, as otherwise the language in subsection A would be "surplussage" without any independent meaning.

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The Division also suggests that the motion asks the ALJ to "summarily" vacate the TO Rule "without consideration of the evidence."[5] There is nothing "summary" about the motion; it will be decided based on full briefing and oral argument. That is considerably more due process than was accorded Respondents by the Division. The Division issued the TO without notice to Respondents, without affording the Respondents an opportunity to present their case to the Assistant Director,[6] and without addressing in the TO the legal arguments made by Respondents to the counsel for the Division. In stark contrast, here there will be complete briefing and oral argument.

In addition, the Division's arguments are internally inconsistent. It argues that under the TO Rule, the ALJ must wait for the final, full evidentiary hearing before acting,[7] yet elsewhere it argues (implausibly) that the pre-hearing conference on October 28, 2009 constitutes the only "hearing" required by TO Rule.[8] Again, the Division cannot have it both ways – these assertions cannot both be true.

In sum, the Division's argument that the ALJ is powerless to grant the motion to vacate must be rejected. Executive officials cannot issue a TO without some opportunity for independent judicial review. As provided above, the assigned ALJ is that opportunity.

III. The TO must be vacated because this proceeding does not comply with the time requirements of the TO Rule.

The Division is correct Respondents' counsel did not object to the hearing being set in February at the pre-hearing conference. It is the Division's responsibility to prove the elements of its case and the Division did not ask that the hearing occur within thirty days of the request for hearing as required by A.C.C. R14-4-307(D). The Division has respective counsel's roles reversed.

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[5] Id., page 4, lines 20-21.

[6] At the time the TO issued, counsel was negotiating a date for Mr. Sir to be interviewed by the Division. During its six-month investigation, the Division never scheduled Mr. Sir's testimony. This is an extremely odd investigation decision when dealing with a situation that requires "immediate action" to protect the public welfare.

[7] *Id.*

[8] Securities Division Response to Respondent's Supplement to Motion to Vacate & Request to Alter Schedule in Section Procedural Order and Motion for Motion Practice Scheduling Order, at page 3, lines 7-14.

But when the hearing regarding the allegations in the Notice takes places, it does not resolve the glaring defects concerning the TO's issuance that requires it be vacated.

Recognizing the extraordinary nature of a TO, the TO Rule requires a prompt hearing when requested by the Respondents. The TO Rule is clear that a hearing must be held "within 30 days... after the written request for hearing." A.A.C. R14-4-307.D. Here, the Respondents requested a hearing more than thirty days ago, yet no hearing has been held. Thus, the TO should also be vacated because this proceeding does not comply with the time requirements of the TO Rule.

First, the Division contends that this argument is waived because it was not included in Respondent's Answer. The Division cites A.A.C. R14-3-106(H), which requires an Answer "to include a motion to dismiss if a party desires to challenge the sufficiency of the complaint." This rule is simply inapplicable. The Respondents have not asked this proceeding to be dismissed, only that the TO be vacated. Nor have the Respondents mounted a challenge to the "sufficiency of the complaint" – the challenge is to the extraordinary TO that threatens to devastate their business.

Next, the Division argues the October 28, 2009 Procedural Conference somehow constitutes the hearing required by the subsection D of the TO Rule. Yet the Commission's procedural rules clearly differentiate between a "prehearing conference" (A.A.C. R14-3-108) and a "hearing" (A.A.C. R14-3-109). Under those rules, a "hearing" means a full evidentiary hearing. The TO Rule itself, immediately after the requirement for a hearing within thirty days, states, "[t]he Commission may, after such hearing" issue its final order. This is the only hearing required or even mentioned in the TO Rule, so it must refer to a full evidentiary hearing. And elsewhere, directly contrary to its argument here, the Division argues the ALJ is powerless to act because the hearing required in the TO Rule has not been held.[9] Either the hearing has been held, or not. The Division cannot have it both ways.

Moreover, due process under the Arizona and United States Constitutions requires a prompt post-deprivation hearing when the government takes a drastic action like shutting down a business, as the Division has done here. This is undoubtedly why the TO Rule requires a hearing within

[9] Securities Division Supplemental Response to Respondents' Motion to Vacate Temporary Order at 4-5.

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thirty days. Thus, the TO Rule, and the Arizona and United States Constitutions, demonstrate that the TO should be vacated. Respondents have not been afforded due process with a hearing.

But as the ALJ and Division counsel know, the proceeding on October 28th was not a hearing. There was no opening statement. No witnesses were called to testify and be cross-examined. There was no rebuttal testimony. No exhibits were introduced into evidence. There were no closing arguments. The October 28th proceeding was exactly what it had been captioned – a "pre-hearing conference." Any suggestion that it was a hearing is a desperate and nonsensical position.

IV. Two Final Comments.

The Division makes the argument that a Motion to Dismiss must accompany the Answer. While the Motion to Vacate is not a Motion to Dismiss, the Motion to Vacate was included with the Answer. The pleading is entitled, "Answer and Motion to Vacate Temporary Order to Cease and Desist."

The Division briefs the issue of whether there is a security in this case. In addition to being premature, those boilerplate legal arguments based solely on the hearsay allegations in the Notice do nothing to address the issue. Only after the evidence is presented, including the facts showing the lenders active participation in key decisions regarding the loans, will the ALJ have the necessary information upon which to base a decision.

RESPECTFULLY SUBMITTED this 25th day of November, 2009.

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ORIGINAL and thirteen copies of the foregoing filed this 25th day of November, 2009 with:

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Copy of the foregoing hand-delivered this 25th day of November, 2009 to:

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Exhibit A

64 N.J. 85

MAYFLOWER SECURITIES CO., INC., Appellant,

v.

BUREAU OF SECURITIES IN the DIVISION OF CONSUMER AFFAIRS OF the DEPARTMENT OF LAW AND PUBLIC SAFETY, Respondent.

Supreme Court of New Jersey.

Argued Oct 24, 1973.

Decided Dec. 4, 1973.

An order of the Bureau of Securities suspended registration of a broker-dealer in securities for employment of an unregistered agent and failure to meet record-keeping requirements. The Superior Court, Appellate Division, affirmed, and the Supreme Court granted certiorari. The Supreme Court, Hall, J., held that the violation of the securities law was technical and not willful and, absent injury to the public interest, suspension for any length of time was illegal; an appropriate sanction could be reprimand together with payment of registration fees for the years involved plus, at most, a monetary penalty.

Order vacated and set aside, and matter remanded to agency for further proceedings.

Pashman, J., filed opinion concurring in part and dissenting in part.

1. Securities Regulation ⇐272

Purpose of uniform securities law record-keeping requirements for brokers was to facilitate bureau investigation and checking to make certain that all requirements of law and rules relative to operation of business are complied with. N.J.S.A. 49:3–47 et seq., 59(b), 68.

2. Securities Regulations ⇐270

Bureau of Securities supposedly has implicit authority to impose sanction such as censure, with or without imposition also of monetary penalty, in cases of violations of securities law which are not of serious nature, such as violations which are not willful or not sufficiently affecting public interest to warrant suspension or revocation. N.J.S.A. 49:3–58, 58(a)(1), (a)(2)(ii), 70(a, b); Securities Exchange Act of 1934, § 15(b), (b)(5), 15 U.S.C.A. § 78o(b), (b)(5).

3. Administrative Law and Procedure ⇐788

Scope of judicial review of administrative adjudications is to determine whether findings could reasonably have been reached on sufficient credible evidence present in record, considering proofs as whole with due regard to opportunity of one who heard witnesses to judge of their credibility, and with due regard also to agency's expertise where expertise is pertinent factor.

4. Administrative Law and Procedure ⇐796

Statutes ⇐219(1)

Appellate tribunal is in no way bound by agency's interpretation of statute or determination of strictly legal issue.

5. Administrative Law and Procedure ⇐758, 763, 811

Court has power to review agency-imposed sanctions under tests of illegality, arbitrariness or abuse of discretion, and court has power to impose lesser or different penalty in appropriate cases. N.J.S.A. 49:3–58, 70(a, b); Securities Exchange Act of 1934, § 15(b), 15 U.S.C.A. § 78o(b).

6. Securities Regulation ⇐277

Where broker-dealer's agent thought he was registered and did business accordingly and broker-dealer also thought agent was registered and employed him accordingly, and there was at worst only careless processing and handling of renewal application by broker-dealer not amounting to gross negligence or reckless disregard, violation of securities law was technical and not willful and, absent injury to public in-

terest, suspension for any length of time was illegal; appropriate sanction could be reprimand together with payment of registration fees for years involved plus, at most, monetary penalty. N.J.S.A. 49:3–56 (a, b, d), 58, 58(a)(1), (a)(2)(ii), 70(a, b); Securities Exchange Act of 1934, § 15(b), 15 U.S.C.A. § 78o(b).

7. Securities Regulation ⇐270

Motion such as motion to supplement record after decision by Bureau of Securities on alleged violations of securities law should ordinarily be made in first instance to Bureau as motion to reopen hearing. R. 2:5–5(b).

8. Securities Regulation ⇐277

Where there was not clearly any willful violation and derogation of public interest, order of suspension of broker-dealer's license for alleged record-keeping violations was set aside.

Joseph M. Jacobs, East Orange, for appellant (Jacobs & Coburn, East Orange, attorneys).

Stephen Skillman, First Asst. Atty. Gen., for respondent (George F. Kugler, Jr., Atty. Gen., attorney, Virginia Long Annich, Deputy Asst. Atty. Gen., of counsel, Thomas H. Sullivan, Deputy Atty. Gen., on the brief).

The opinion of the Court was delivered by

HALL, J.

This appeal derives from an order of the Bureau of Securities suspending for a period of 20 days the registration of appellant Mayflower Securities Co., Inc. (Mayflower) as a securities broker-dealer, and prohibiting its officers, agents and employees from effecting any securities transactions from or within New Jersey during that period. The order, which has been stayed pending appeal, was based on findings by the Chief of the Bureau, who sat as the hearing officer, that Mayflower had violated provisions of our securities law and rules by employing an unregistered agent, Alan Robert Levine,[1] and by failing to possess certain customer transaction records required to be kept. The latter violation was discovered during the Bureau's investigation of the former. The order did not allocate the period of suspension as between the two violations. The Appellate Division affirmed in an unreported opinion, holding simply that there was ample credible evidence in the record to support the agency findings and conclusions. We granted certification on Mayflower's petition. 63 N.J. 558, 310 A.2d 473 (1973).

The interrelated questions before us are, if effect, whether the claimed violations meet the legal requisites permitting suspension of a registration under the statutory provisions authorizing this penalty and, even if they do, whether the penalty, under the circumstances, is so harsh as to be arbitrary and an abuse of discretion.

Since the pertinent statute and rule provisions have not previously been considered by this court, we should first outline our view of them.

The scheme of New Jersey's regulation of the securities business in the state is set forth in the Uniform Securities Law (1967), N.J.S.A. 49:3–47 et seq., and in rules adopted by the Bureau of Securities pursuant thereto (see N.J.S.A. 49:3–67(a)), now found in N.J.A.C. 13:13–1.1, et seq. The law is generally modeled upon the Uniform Securities Act approved in

1. When the proceeding was instituted by the Bureau, the agent was also a party, charged with engaging in New Jersey securities transactions while unregistered and ordered to cease and desist therefrom. The order against Mayflower vacated the restraint against Levine and imposed no penalty upon him. He was reregistered immediately and has not been a party to the action since.

1956 by the National Conference of Commissioners on Uniform State Laws, 7 Uniform Laws Annotated, Business and Financial Laws (Master ed. 1970) 691, but, as we have previously noted, with differences in a number of respects. See Data Access Systems, Inc. v. State of New Jersey, Bureau of Securities, 63 N.J. 158, 162, 305 A.2d 427 (1973).

Basic to the regulatory scheme, insofar as pertinent to the case, is the requirement of registration with the Bureau—in effect, licensure after meeting certain qualifications—of all broker-dealers and their agents (salesmen). An agent must be employed by a particular registered broker-dealer. N.J.S.A. 49:3–56(a) and (b). These subsections expressly declare it to be unlawful for any person to act as a broker-dealer or agent in this state unless he is so registered and for any broker-dealer to employ an agent unless the latter is registered. By statute, N.J.S.A. 49:3–56(d), and rule, N.J.A.C. 13:13–5.1, all registrations expire on December 31 of the year next ensuing the year in which the registration became effective and must be renewed prior to such date by the completion and submission of forms issued by the Bureau and the payment of a fairly nominal fee. It is safe to say that renewal is *pro forma* unless the application therefor discloses or the Bureau otherwise knows of some change of circumstance which would demonstrate that the applicant no longer meets the required qualifications. See N.J.A.C. 13:13–5.1, 5.2, 5.3, 11.14 and 11.16.

[1] A second pertinent requirement of the regulatory scheme is that all broker-dealers must keep, and preserve for three years, at their principal place of business, open to the inspection of the Bureau, all books and records required to be kept by the Securities and Exchange Commission. N.J.S.A. 49:3–59(b) and N.J.A.C. 13:13–1.9. The purpose is obviously to facilitate Bureau investigation and checking to make certain that all requirements of the law and rules relative to the operation of the business are complied with. See N.J.S.A. 49:3–68. It is not disputed here that customer transaction records are among those required to be maintained and available.

Three forms of sanctions are expressly prescribed by the law for violations of the statute or rules by a broker-dealer or agent, apparently to be selected from by the Bureau Chief in the reasonable exercise of his discretion depending on the nature and circumstances of the violation and the offender. One, not involved here, is a regular criminal prosecution, for a misdemeanor, of one who "willfully" violates the law or rules. N.J.S.A. 49:3–70(a). This is derived from the Uniform Act, 7 Uniform Laws Annotated, *supra*, § 409(a), p. 768. Another is a monetary penalty, presumably administratively assessed by the Bureau, of not more than $200 for a first violation, not more than $500 for a second violation and $500 for subsequent violations. N.J.S.A. 49:3–70(b). It is to be noted that the availability of this sanction does not require a willful violation, although we would think it usable even if the violation were of such character. This sanction is not provided for in the Uniform Act and appears to be peculiar to New Jersey. The third form, that utilized here, is suspension or revocation of a registration. N.J.S.A. 49:3–58. This too is modeled after the provisions of the Uniform Act. 7 Uniform Laws Annotated, *supra*, § 204, pp. 710–713, and is substantially like section 15(b) of the federal Securities Exchange Act of 1934, 15 U.S.C.A. § 78*o*(b)(5). This procedure involves a full-scale hearing, if requested by the offender, and must be bottomed, as far as this case is concerned, on two fundamental findings: (1) that the order "is in the public interest" (N.J.S.A. 49:3–58(a)(1)), and (2) that the broker-dealer or agent complained against "has *willfully* violated or *willfully* failed to comply with any provision of this law or a predecessor law or any rule or order authorized by this law or a predecessor law" (N.J.S.A. 49:3–

58(a)(2)(ii)). (Emphasis supplied). The "public interest" requirement does not come into play unless a willful violation is first found. These severe sanctions seem obviously designed for use in serious situations.

The "public interest" requirement seems to imply a conclusion that revocation or suspension of registration is felt necessary to protect present and future customers of the registrant, *i. e.*, the investing public—for example, revocation, if the registrant is shown to be unfit to continue to engage in the securities business, or suspension from business for a period, to impress upon him the necessity for drastically mending his ways lest he reach the level of unfitness. *Cf.* 69 Am.Jur.2d, Securities Regulation—Federal, § 357. It is worthy of mention that the Commissioners' Note to the Uniform Act, in commenting upon this requirement, says: "But the requirement that such a finding be made in all cases emphasizes that not every minor or technical infraction is meant to result in a denial, suspension or revocation order." 7 Uniform Laws Annotated, *supra*, § 204, p. 715.

With respect to the meaning and intent of the "willful" requisite, the Commissioners' Note says this:

> As the federal courts and the SEC have construed the term willfully in § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*(b), all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing. Proof of evil motive or intent to violate the law, or knowledge that the law was being violated is not required. The principal function of the word 'willfully' is thus to serve as a legislative hint of self-restraint to the Administrator. [7 Uniform Laws Annotated, *supra*, § 204, p. 715].[2]

This Note may well be too simplistically stated in light of the myriad of factual situations which may arise. We need not consider the problem beyond a few short comments. Certainly a deliberate omission to act should be considered to be willful just as an intentional act of commission is. Federal cases under section 15(b) of the Securities Exchange Act of 1934 find affirmative or negative conduct to be willful where there has been gross negligence or reckless conduct in disregard of plain duty in serious situations, such as fraudulent representations to customers or the public.[3] On the other hand, mere careless or inadvertent acts or failures to act resulting in insubstantial technical violations ought ordinarily not to warrant a conclusion of willfulness. See *e.g.*, In re Lowell Niebuhr & Co., Inc., 18 S.E.C. 471 (1945).

[2] Curiously perhaps, neither our law and rules nor the Uniform Act expressly provide for the imposition of lesser sanctions, such as censure or reprimand,[4] where there is a violation which is not of a serious nature—for example, one not willful or not sufficiently affecting the public interest. We would suppose that the Bureau has implicit authority to impose such

2. The Note under the criminal penalties section, 7 Uniform Laws Annotated, *supra*, § 409(a), p. 769, refers to this quoted comment to § 204 as indicative of the meaning of "willfully" in the criminal section. We need not consider this aspect here.

3. See *e. g.*, Quinn and Company v. Securities and Exchange Commission, 452 F.2d 943 (10th Cir. 1971), cert. den. 406 U.S. 957, 92 S.Ct. 2059, 32 L.Ed.2d 344 (1972); Stead v. Securities and Exchange Commission, 444 F.2d 713 (10th Cir. 1971), cert. den., 404 U.S. 1059, 92 S.Ct. 739, 30 L.Ed.2d 746 (1972); Hanly v. Securities and Exchange Commission, 415 F.2d 589 (2nd Cir. 1969); Dlugash v. Securities and Exchange Commission, 373 F.2d 107 (2nd Cir. 1967); United States v. Benjamin, 328 F.2d 854 (2nd Cir.), cert. den. 377 U.S. 953, 84 S.Ct. 1631, 12 L. Ed.2d 497 (1964); Barnett v. United States, 319 F.2d 340 (8th Cir. 1963).

4. In the federal Securities Exchange Act of 1934, the section authorizing suspension or revocation of an over-the-counter broker or dealer for willful violations when required in the public interest also expressly empowers censure as a permissible sanction. 15 U.S. C.A. § 78*o*(b)(5).

a lesser sanction, with or without the imposition also of a monetary penalty, in such cases, following informal hearing or conference, and would trust that, if such a procedure is not now followed, it will be instituted, accompanied by the adoption of an appropriate rule.

[3–5] Finally, on the matter of the applicable law, the thoroughly established scope of judicial review of administrative adjudications should be briefly noted. As to state agency findings, the role of the appellate court is that of determining " 'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility * * * and * * * with due regard also to the agency's expertise where such expertise is a pertinent factor." Close v. Kordulak Bros., 44 N.J. 589, 599, 210 A.2d 753, 758 (1965). The appellate application of this standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings in the manner outlined in State v. Johnson, 42 N.J. 146, 161–162, 199 A.2d 809 (1964). An appellate tribunal is, however, in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue. As far as review of agency imposed sanctions is concerned, there is no doubt of a court's power of review under the tests of illegality, arbitrariness or abuse of discretion and of its power to impose a lesser or different penalty in appropriate cases. West New York v. Bock, 38 N.J. 500, 519–520, 186 A.2d 97 (1962); Ishmal v. Division of Alcoholic Beverage Control, 58 N.J. 347, 277 A.2d 532 (1971).[5] See generally In re Senior Appeals Examiners, 60 N.J. 356, 290 A.2d 129 (1972), and cases cited therein. Of course, we are not unmindful in the review of securities cases that the area is a sensitive one, open to great abuses and therefore subject to careful governmental regulation to assure that those who engage in the business meet high standards in the interest of protection of the public.

We turn to the factual aspects of the case before us and the application thereto of the legal principles we have set forth. We accept the undisputed representations of counsel that Mayflower is a sizeable broker-dealer in over-the-counter securities, handling over 100 issues and acting as a specialist or "market maker" in about 15 of them. It is based in New York City and has five branches in New Jersey, with 600 full and part-time agent-salesmen employed here serving accounts of about 10,000 New Jersey customers. It is obvious that the 20 day suspension would put Mayflower and its 600 salesmen out of business in New Jersey for that period, would deprive its customers of their services, and might well result in the permanent loss of some customers. There is nothing in the record to indicate that Mayflower has been a persistent violator of our law and rules.

[6] With respect to the agent registration violation charge, there is no doubt that Levine was not registered as an agent with the Bureau from January 1, 1969 to April 1972, that Mayflower employed him during that period and that he executed New Jersey security transactions throughout the period, resulting in a violation by Mayflower of N.J.S.A. 49:3–56(b). Mayflower so concedes. It would have been well advised to have so stated on the record at the outset of the agency hearing, the thrust of its presentation being explanation and extenuation.

That explanation revolves around the Bureau's and Mayflower's practice of processing registration renewal applications of the latter's agents. These practices were loose at both ends. Although the statute appears to place responsibility for renewal upon the agent, the practice was for the

5. An intimation to the contrary in Higgins v. New Jersey Bureau of Securities, 100 N.J. Super. 266, 276, 241 A.2d 660 (App.Div. 1968), is incorrect.

Bureau to send renewal applications to Mayflower at its main office in New York for all agents whose registration expired at the end of the particular year and the latter undertook to secure the renewals. In fact, Levine testified that he personally did not know how long his registration was good or when it expired. For the year ending December 31, 1968, the Mayflower expirations totalled 200 to 250. Its main office employees sent to the particular New Jersey office the applications for agents working out of that office. In the case of Levine, who was associated with the Union branch, the branch manager gave him the application, which he completed and returned to the manager who told him he would send it to the main office. The main office procedure was, upon receipt of all the renewal applications, to forward them to the Bureau with a check to cover the fees and a receipt for each, prepared by Mayflower, to be executed by the Bureau and returned to Mayflower for its files. (This receipt is the only indicator the employer has to evidence agent registration; the Bureau issues no license card or other document to the agent, which it might well do, since he possesses no proof that he is entitled to engage in New Jersey security transactions. We are informed that since the inception of this case, the Bureau follows up with the employer broker-dealer as to agent renewal applications not received by it.)

No one is certain what happened to Levine's application after he returned it to the branch manager following completion. The testimony was that it was not in the Bureau's files. (The matter came to light in May 1972 when Levine left Mayflower's employ to become associated with another broker and filed the required statement of that change with the Bureau, N.J.S.A. 49:3–56(b).) Whether the renewal application was mislaid in the branch office, mislaid in the main office or mislaid in the Bureau office cannot be determined. The fact that no renewal registration was effected was not caught by Mayflower apparently because an office employee misread, carelessly we think, an earlier receipt in Levine's file as covering the 1969 renewal.

It is clear that Levine was duly qualified for renewal covering the years 1969, 1970, 1971 and 1972. It is equally clear that he thought he was registered and did business accordingly and that Mayflower thought he was registered and employed him accordingly. We find no evidence of bad faith on the part of either. At worst, there was only careless processing and handling of the renewal application by Mayflower not amounting to gross negligence or reckless disregard. The violation must be called technical and not willful. While we fully appreciate the importance of agent qualification and registration in the regulatory scheme (see Note, Securities Regulation in New Jersey, 17 Rutgers L.Rev. 602, 607–608 (1963)), there was certainly no injury to the public interest in the instant circumstances.[6]

Moreover, the Bureau did not expressly find, as N.J.S.A. 49:3–58(a)(2)(ii) and (a)(1) positively require, that Mayflower willfully violated N.J.S.A. 49:3–56(b) and that suspension of its registration was in the public interest, nor can we infer such findings from what it did say. (The Bureau's failure in this regard also applies to the record-keeping violation charge.) Even

6. Since Levine's registration was not renewed, according to the Bureau's files, for the two year period commencing January 1, 1969, the Bureau did not send Mayflower a renewal application for the two year period commencing January 1, 1971. This resulted in Levine not being registered for this second two year period as well, which could be said to amount to a second violation. As we have said, the practice was for the Bureau to send agent renewal applications to Mayflower and it seemingly relied on the Bureau to thereby notify it of all expiring agent registrations rather than check it own records. This was also negligent on its part. We do not think, however, that, under the circumstances, this further violation can be called willful. In any event, there was no injury to the public interest in view of Levine's continued qualification during the period.

if such findings had been made, we would have to conclude that they would not be supported or warranted by the record, and so would be improper, for the reasons stated.

Consequently, it has to follow that the sanction of suspension for any length of time for this registration violation is illegal and must be set aside. Since, as will shortly be indicated, remand to the Bureau is required as to the record-keeping violation charge, we think it desirable that the appropriate sanction should be imposed by the Bureau, after hearing, rather than by this court. Such a sanction could validly be a reprimand together with payment of the registration fees for the years involved plus, at the most, a monetary penalty under N.J.S.A. 49:3-70(b).

The record-keeping violation charge presents a somewhat more complicated and different situation. When Levine's notice of change of employment reached the Bureau in May 1972 and a check of his file showed no registration beyond 1969, a Bureau investigator went to Mayflower's main office to check its records to ascertain whether Levine had engaged in New Jersey transactions in the interim. (There would have been no violation of New Jersey law if he had not.) Apparently the records were in some disarray by reason of a recent moving of Mayflower's offices. He was shown Levine's commission statements for the entire period which demonstrated that he had executed securities transactions in each of the years in question, but the statements identified the customers served only by number. Whether the customers served were from New Jersey or elsewhere could only be established by examination of the transaction records of the customers whose numbers appeared on the commission statements. Such were produced and examined as to the years 1971 and 1972, which demonstrated a few New Jersey transactions during each of those years. An officer of Mayflower, according to the report of the investigator and his testimony at the hearing, told him that these records for 1969 and 1970 could not be located and probably had been mislaid, lost or destroyed in the course of the office moving.

This proceeding was instituted by the Bureau by service of a proposed order upon Mayflower, together with a notice that the order would become final unless a hearing was requested. Such a procedure is permitted, but not mandated, by the registration suspension and revocation section of the law. N.J.S.A. 49:3-58(c)(2).[7] The proposed order here simply recited that "it appearing that" Levine's registration expired on December 31, 1968, that he had been employed by Mayflower from January 1, 1969 through April 1972, that Mayflower's records showed that he had executed transactions for New Jersey residents in 1971 and 1972 and that Mayflower "could not provide certain records for 1969 and 1970," all in contravention of cited sections of the law and rules. It went on to state, as far as Mayflower was concerned, that its registration as a broker-dealer "be and it is hereby proposed to be revoked." The attorney for Mayflower sought a detailed statement of the record-keeping violation charge, but was furnished only a copy of the investigator's report.

[7] The attorney tells us that he concluded therefrom that the record-keeping charge was not considered to be of substantial import but only incidental to the charge of lack of registration of the agent, that the latter was the real thrust of the proceeding, and, as previously mentioned, that there was no question but that Levine did engage in New Jersey transactions dur-

7. In view of what happened in this case, we suggest the desirability of utilizing instead, at least in cases which might result in suspension or revocation of a registration, a detailed statement of charges so that there may be not the slightest doubt in the mind of the alleged offender or his attorney of what he is charged with and what he must meet in defense of the proceeding.

ing 1969 and 1970 as well as in 1971 and 1972. He also points out that little was made of this aspect of the matter at the hearing, the previously mentioned brief testimony of the investigator being the only reference to the subject. Accordingly, he offered no evidence on the matter at the hearing and was shocked when the Bureau Chief imposed the suspension based at least in part on the absence of the 1969 and 1970 customer records. The attorney thereafter represented to the Appellate Division, and has represented to us, that the missing records were in existence at the time of the investigator's visit and are now in existence and that office personnel had simply not then looked far enough for them.[8]

[8] While the attorney was mistaken in his assessment of the record-keeping charge, his view and consequent approach were not completely without justification. In any event, the sanction of suspension is so severe a penalty that any such assessment should not be permitted to stand in the way of fair dealing and justice. We therefore are of the opinion that the order of suspension as it relates to this alleged violation should also be set aside for this reason (as well as because of the failure of the final order to find a willful violation and derogation of the public interest) and the matter remanded to the agency for a further hearing to give Mayflower the opportunity to present evidence to substantiate the representations made. If they are satisfactorily established and the records in question submitted, any violation based on failure to produce records on the occasion of the investigator's visit would be of the most technical character—certainly not willful or in derogation of the public interest—and no sanction at all would fairly be called for.[9] Of course, if the supplemental evidence discloses that customers' records were not maintained or that they were maintained but destroyed or lost within the three year period, a more serious situation will be presented.

The order of the Bureau of Securities suspending the registration of Mayflower is vacated and set aside and the matter is remanded to that agency for further proceedings as detailed in this opinion. No costs.

For reversal and remandment: Justices HALL, SULLIVAN and CLIFFORD and Judges CONFORD and COLLESTER—5.

For reversal: Justice PASHMAN—1.

PASHMAN, J. (concurring in part and dissenting in part).

I am in agreement with so much of the opinion of the Court that deals with the facts concerning the charge against Mayflower Securities that its agent Alan Robert Levine engaged in New Jersey securities transactions while unregistered. This infraction clearly was not willful nor injurious to the public interest.

The majority has remanded to the Bureau the matter of sanctions. However, it is indicated that said sanction "could validly be a reprimand together with payment of the registration fees" for the several years involved. If the Bureau has implicit authority to impose such a lesser sanction as censure or reprimand, then certainly this Court can do likewise.

8. After the Bureau decision and the filing of a notice of appeal, the attorney made a motion to the Appellate Division, pursuant to R. 2:5-5(b), to supplement the record by testimony to this effect. The motion was denied. Any such application should ordinarily be made in the first instance to the Bureau as a motion to reopen the hearing, but we are convinced such would have been futile in view of the unduly stringent attitude of the Bureau Chief throughout the hearing.

9. It is to be noted that records for the first four months of 1969 were not, at the time of the investigator's visit, required to be retained under N.J.S.A. 49:3-59(b) since they were more than three years old. It would also seem that non-current records less than three years old, possibly kept in storage, should not have to be made available for inspection at the moment of the request.

As to the record-keeping violation, assuming all the facts as developed by the Bureau, the maximum penalty should also be a reprimand. This probability is envisioned by the majority.

Accordingly, I see no need to continue this matter which has now been in the Bureau and the Court for some time. We have jurisdiction for a final disposition. We can impose a penalty. Both charges call for a reprimand and nothing more.

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In the Matter of Lawrence P. BRADY, Jr., An Attorney-at-Law.

Supreme Court of New Jersey.

Argued Oct. 24, 1973.

Decided Dec. 12, 1973.

Disciplinary proceeding. The Supreme Court held that indicating and implying to a client that counsel is able to influence improperly police officers and improperly withholding and failing to promptly pay to a client funds which the client is entitled to receive warrants six months' suspension.

Suspension ordered.

Attorney and Client ⇐58

Indicating and implying to client that counsel is able to influence improperly police officers and improperly withholding and failing to promptly pay to client funds which client is entitled to receive warrants six months' suspension. Code of Professional Responsibility, DR9-101(C), DR9-102(B)(4).

Paul M. Hanlon, Jersey City, for Hudson County Ethics Committee.

Gerald D. Miller, Jersey City, for respondent (Miller, Hochman, Meyerson & Miller, Jersey City, attorneys).

PER CURIAM.

The Hudson County Ethics Committee found respondent Lawrence P. Brady, Jr. guilty of having violated two disciplinary rules of the Code of Professional Responsibility, namely, DR9-101(C) by indicating or implying to his client that he was able to influence improperly a public official, and DR9-102(B)(4) by failing to pay or deliver to his client funds she had entrusted to him.

The Committee conducted a two-day hearing on charges made by Mrs. Carol Novak at which respondent was represented by counsel. Mrs. Novak testified that on or about March 2, 1971, accompanied by her father, Edward Lodge, she consulted with respondent and asked him to represent her in the event she was locked up by the Union City police. She told him she had been harassed and threatened with arrest because of her association with one J. F., who had been involved in the armed robbery of a travel service agency. It appeared that sometime after the robbery she had driven J. F. to Newark where he had attempted to cash stolen traveler's checks. She also told respondent that she had sold a motor vehicle to Lee Motors of Fort Lee for $1,400 and that Lee Motors had stopped payment of the check at the request of the police because it was suspected that she had purchased the vehicle with funds derived from the robbery. Respondent agreed to represent Mrs. Novak in the event of her arrest and to endeavor to obtain release of the $1,400.

During this first interview respondent received $1,000 in cash from Mrs. Novak and her father. Mrs. Novak testified it was agreed that $500 would be respon-